IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 69 of 1995.

Date of decision: 6.3.2007.

Shiv Chand ….. **Appellant.**

Vs.

Manghru & ors. …. **Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Pt. Om Parkash, Advocate.

For the Respondents : Mr. R.K.Sharma, Advocate.

Surjit Singh, Judge (Oral).

Heard and gone through the record.

2. Suit was filed by the plaintiff- appellant, seeking issuance of permanent prohibitory injunction against the respondents-defendants, restraining them from raising construction on any portion of the land, measuring 1 Bigha 3 Biswas, which was alleged to be in joint possession of the parties, though owned by the State Government. It was alleged that without seeking partition or without obtaining the consent of the plaintiff- appellant, the respondents-defendants had started preparation for raising construction on a portion of the said property.

3. Suit was contested by the respondents- defendants and it was alleged that partition had taken place long-long back and the parties were in separate possession of their shares. Several

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Whether the reporters of the local papers may be allowed to see the Judgment?

preliminary objections were also raised. The trial court concluded that the property was jointly possessed by the parties and unless partition took place or the consent of the plaintiff- appellant was obtained, respondents- defendants could not be allowed to raise construction on any portion of the property. Consequently the suit was decreed and the respondents- defendants were restrained from raising construction on any portion of the joint property till partition took place or the plaintiff consented to such construction.

4. Appeal was filed by the respondents- defendants in the court of District Judge, who accepted the same and reversed the finding of the trial court that the property is joint. Consequently, the decree of the trial court was set-aside and the suit dismissed.

5. The first appellate court gave the reasons that (i) the State of Himachal Pradesh is the owner of the property and both the parties are encroachers and one encroacher cannot seek issuance of permanent injunction against the other, (ii) parties being in joint possession, every person in joint possession has the right to use the joint property in the manner he likes and can even raise the construction, provided the area being covered under construction does not exceed the share of the party raising such construction and (iii) plaintiff himself admitted while in the witness box that the parties were in separate possession and if it were so, there could not have been any question of issuance of injunction, especially when the parties are not the owners, but only encroachers.

6. Aggrieved by the judgement and decree of the first appellate court, plaintiff- appellant filed the present appeal, which was admitted on the following substantial questions of law:-

1. Whether one of the joint party in possession of the land is entitled to raise construction, without the concurrence of the other & without any partition of the joint land to the prejudice of the other joint party in possession?

2. Whether two persons who are in joint possession of the land claiming themselves to be in adverse possession of the real owner, one of them is entitled to have a decree for injunction against the other who is raising construction on the land jointly possessed by them?

3. Whether the learned First Appellate Court was right to make out a case which is not pleaded by the respondents/ defendants in their written statement and whether the judgement based on such grounds is sustainable in the eyes of law?

7. The view taken by the first appellate court that one of the persons in joint possession can raise construction on a portion of the joint property provided the area sought to be covered does not exceed his share, is contrary to the proposition of law. The law is very clear that a person in joint possession of immovable property cannot change the nature of the suit property unless the property is partitioned or the other persons in joint possession consent to such change in the nature of the property. Consequently, the question No.1 is answered in favour of the appellant.

8. Coming to the next question, the view taken by the learned first appellate court is again erroneous. Persons in settled joint possession of immovable property are supposed to respect the right to joint possession of each other in the same fashion and manner as the owners in joint possession. Therefore, the view taken by the learned first appellate court that both the parties being encroachers, either of them can change the nature of the property without partition or without consent of the other is contrary to well settled proposition and principles of law. Hence, this question is also answered in favour of the plaintiff- appellant.

9. However, as regards question No. 3, it is made out from the statement of Shiv Chand, one of the plaintiffs- appellants, who appeared as PW 1, that parties are not in joint possession, but in separate possession to the extent of half of the area of the suit property. Admittedly, the parties are not the owners of the suit land, as per averments contained in the pleadings and as per the testimony of PW 1, and it is the State Government, who is the owner of the property. Partition, as per procedure prescribed by law, cannot take place, unless the parties obtain a declaration that they have acquired title by prescription or by some other mode. The parties being not the owners and presumably their possession being adverse, the only manner by which they can separate their shares is by their own arrangement. In the present case, from the testimony of PW 1 Shiv Chand, appellant, it is clear that the parties are in separate possession since the times of their predecessor, because he has stated that the parties are in separate possession to the extent of

their shares and that on the death of their predecessor, the appellants came in possession of that portion, which was held by their predecessor. In view of this statement of the plaintiff- appellant, it cannot be said that the parties are in joint possession, and if the parties are not in joint possession, the appellants are not entitled to the relief of injunction, asked for by them. Hence, this question is answered against the appellant.

10. In view of the answer to question No.3, the appeal is dismissed.

March 6, 2007. **(Surjit Singh)**
(*Hem*) **Judge.**